

The Constitution for Europe and Criminal Law

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The Constitution for Europe and Criminal Law: a step not far enough

§1. Introduction

This Special Issue of the Maastricht Journal of European and Comparative Law is the off-spin of an Expert Meeting held in Maastricht in August 2004 between a number of European experts on the European Dimensions of Criminal Law.¹ The meeting was initiated to consider the consequences of the further Europeanisation of the field of criminal law and its future perspectives. The three contributions to this issue testify to the changing perspectives that are underway, and represent the three different levels relevant to the debate. Whereas Joachim Vogel, Professor of Criminal Law and Criminal Procedure, Universität Tübingen, deals with the idea of an European Integrated Criminal Justice System (meta-level), Anne Weyembergh, Assistant Professor and Assistant Director of the Institute for European Studies at the Université Libre de Bruxelles, focuses on a specific principle (meso-level, i.e. harmonisation) within that system. Kai Ambos, Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August Universität Göttingen, goes to the heart of criminal responsibility in his contribution, and investigates whether common norms of substantive criminal law can be developed (micro-level).

In this editorial I would like to offer a brief consideration of the relationship between a possible European criminal justice system and the national systems. This will be done in the context of the new Constitution for Europe. What changes will the Constitution bring in this respect? What opportunities could and should have been used?²

§2. The Constitution for Europe

¹ The meeting was organised by the Criminal Law Department of Maastricht University on behalf of the Human Rights Research School, in which Utrecht University, Erasmus Rotterdam University, Open University Netherlands and Maastricht University participate.

² At the time of writing, the results of the referenda in France (29 May) and in the Netherlands (1 June) were unknown.

The Constitution for Europe brings a number of changes to the criminal law of the European Union. The Charter of Fundamental Rights has been incorporated and the area of freedom, security and justice has been given a new chapter (Articles III-257-277). The new treaty creates (once again) new legal instruments that are applicable in the field of criminal law:³ European laws and European framework laws (Art.III-270).

The treaty bases almost its entire policy in the field of mutual recognition on a principle that it does not define: mutual recognition (Articles III-260 and 270). It is also interesting to see the word harmonisation used now for the first time instead of approximation (Article III-272). An organic law is now required for Eurojust (Article III-273), the European Public Prosecutor (Article III-274) and Europol (article III-276). One of the most important steps is the mandate given to the European Council to establish a European Public Prosecutor's Office (Article III-274).

Whereas on the one hand the position of the European Parliament has been strengthened, the position of states has become much weaker. An individual state may no longer make a proposal for new acts, as there must now be at least a quarter of Member States supporting a proposal (Art. III-264). Only if a Member State considers that a draft European framework law could affect 'fundamental aspects of its criminal justice system, may it request that the draft framework law be referred to the European Council.' (Art. III-270, par. 3 and 271, par. 3).

In other aspects, the Treaty demonstrates that much remains the same. Despite the fact that 'operational planning' is now mentioned in Article III-258, in the field of criminal law the steering instrument remains legislation. The basic problem herewith is that it requires implementation and enforcement by national authorities. This has two important consequences. The first is that much of its binding effect will get lost and that the enforcement mechanism is weak. The second is that the European legislator is not involved in law enforcement. It is far away from the day to day

³ The Treaty does not clarify the relationship between the new legal instruments and the older ones that were enacted under the Maastricht regime (such as joint actions) or the Amsterdam regime (framework decisions). How do Article I-6 (The Constitution and law adopted by the institutions shall have primacy over the law of the Member States) and Article I-33 (A European framework law shall be a

concerns of crime and criminal justice. Thus, it does not learn from its own experiences and is unable to get a real picture of the volume and nature of crime.

The chosen method of development is thus counter-productive. The real influence of the harmonisation model has so far been marginal, or even absent.⁴ In the first place this has to do with the character of compromise legislation. Instruments are often vaguely written and non-binding. Every member state is left some room as to the interpretation of the instruments. The second reason for the variety of enforcement is the fact that implementation is obligatory. By interpreting the implementation obligations in a 'rather national' way in its domestic implementing legislation, it is possible for a member state that tasted defeat in the negotiation process to have its own way after all. The third reason exists in the absence of a common court. The actual role of the Court of Justice in the explanation of Framework Decisions in preliminary rulings is yet to be determined. The fourth reason is the use of different authentic languages. This leads to situations in which there are major differences in the final enforcement in the member states. The European Union has grown from 15 to 25 member states, from 375 million citizens to 450 million citizens. That magnitude makes the finding of a common denominator even harder than now. The vague norms that result from it will further decrease the binding force of harmonisation. The new treaty does not bring this to an end. To the contrary, it further facilitates compromise legislation. This will lead to more freedom for the executive in the interpretation of the law, endangering the rule of law.

§3. Choices I: a separate European system

One of the most prominent changes concerns the establishment of a European Public Prosecutor. However, the Constitution fails to provide this new institution with the necessary legal tools to perform its task. Article III-274 states that the European Public Prosecutor will exercise its function in national courts. The Constitution does not change the applicable national law. This means that the added value of a European

legislative act binding, as to the result to be achieved upon a Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods) relate?

⁴ See for example T. VanderBeken, *From Brussels with Love, Bespiegelingen over de invloed van de Europese Unie op het Belgisch strafrecht*, Preadvies voor de Vereniging voor de vergelijkende studie van het recht van België en Nederland, 2002.

Public Prosecutor is limited to the decision to prosecute. It is questionable whether it makes sense to establish such a prosecutor for that reason only. The prosecution of the cases brought by the EPP will be conducted in a hybrid system, between a European criminal justice and a national criminal justice system. It is regrettable that the European law determining the general rules of the European Prosecutor is limited to procedural matters. It misses the development of substantive law, especially of the general part of criminal law. Every national criminal justice system has a general part that determines under which conditions conduct is regarded as criminal and to which extent a perpetrator must have had the intent to commit certain behaviour. For instance, breaking a shop window is only a crime of vandalism if a person deliberately intended to break the window, not if a person stumbled over his feet and fell into it. The general part of criminal law can be regarded as the foundation on which each criminal justice system is built. Most jurisdictions have therefore codified the general part in the first section of their Penal Code.

Although all criminal justice systems in the world have constructed notions of criminal responsibility on the basis of these two factors (prohibited conduct and mental element) in one way or another, their concepts, applications and codifications differ tremendously. Despite its influential legislation since 1992, the European Union has not formulated a general part. The EU has obliged its members to criminalise certain behaviour according to definitions (e.g. participation in a criminal organisation) and to allow the prosecution of legal entities (e.g. counterfeiting of the euro). It has also given rules on prohibited conduct and mental element with regard to illegal smuggling of immigrants. Although these examples are linked to specific crimes, they implicitly presume the existence of notions of a general part. Now that the European Union is establishing a European Public Prosecutor, taking the first step towards direct enforcement, it is time to make the underlying choices explicit. Otherwise it will hardly be possible to stipulate a consistent policy of prosecution.

The tremendous importance of conceptualising a general part lies, on the one hand, in the hypothesis that if there is no common view on the general part, then the actual enforcement of criminal law in the EU will differ from state to state, which may stand in the way of further integration of Europe. On the other hand, the eventual establishment of a European criminal justice system with the competence of direct

enforcement, in the sense that a European Public Prosecutor may prosecute before an European Criminal Court, requires the drafting of a general part.

The Constitution represents a missed opportunity not to start the construction of a European criminal justice system. Although Europol, Eurojust, European Public Prosecutor are now provided for, they have their main tasks in the co-operation between the Member States. The logical step to proceed to a separate European system was not taken.

§4. Choices II: complete harmonisation

The self-evident explanation for further European integration is too simple: we need European criminal law because of the ideals of European integration and because citizens are not able to move freely in a situation in which one state criminalises what is legal in another.⁵ After all, Europe has a much longer tradition in diversity than in uniformity. To a certain extent, things in law are as with food. One may certainly hope that European food regulations will not lead to cheese, sausages and tomatoes having exactly the same taste all over Europe. What matters is not whether Dutch cheese is better than Italian cheese or French cheese. What matters is that various cheeses are different. The availability of choice contributes to the quality of life. In this respect, the United States' system of a Model Penal Code may also offer an example, especially in view of the fact that the model laws lack obligatory effect for the states. This has certainly given more time to the drafters and contributed positively to its quality and clarity.

Complete Europeanisation would lead to static law, in which no experiments can be undertaken. The experience of other states may not contribute to the development of law. In my opinion, one could consider Europeanisation of criminal law if there is a concrete practical necessity for doing that. Then, one should even support the creation

⁵ This argument conflicts with another argument that presumes that criminals profit from the differences in the various legal systems. It is hardly conceivable that one group of EU citizens (those who commit crimes) are extremely well versed in comparative criminal law in order to select the best place for the commission of a crime, whereas the other group of EU citizens (those who do not commit crime) are paralyzed in their freedom by the mere existence of differences between the criminal justice systems within the EU.

of a full-fledged European Criminal Justice System, a step much further than the one taken by the Constitution.

§5. Choices III: a partly European, partly national system

What could such an arrangement look like? At the occasion of the opening of Eurojust, some two years ago, the Dutch Minister of Justice suggested the creation of a special European competence for certain cross-border criminal offences, leaving the remainder of criminal offences to the national authorities.⁶ To cut a long story short, it was his point of view that it is no use to harmonize the entire criminal justice system because 90% of all criminal offences have only a national connection. The proposal of the Minister was not worked out in detail, but it was very interesting. Surprisingly, this idea was not followed by a proposal, even though the Netherlands held the presidency during the second half of 2004.

However, the Minister's idea deserves a follow-up. A division between European and national criminal law implies a complete European criminal justice system, a European criminal court, a European Prosecution, European police, all based on European legislation and supervised by a freely elected European Parliament. If we do this, it requires a conceptualization of what is to be European criminal law and what is to be national criminal law. However, in the memorandum released by the Dutch Minister of Justice in March 2004, the government retains the condition of double criminality in co-operation with other Member States where the proscribed conduct has been committed in the Netherlands.⁷ Consequently, if the crime is committed and not liable to punishment in the Netherlands, no international co-operation can be provided.

A different model could be based on the following: if the point is that foreign countries can not claim jurisdiction over offences that are not liable to punishment here, yet they are committed here, then the restriction of jurisdiction ought to be the

⁶ A few days later this point of view was reiterated in the Memorandum on a European Legal Space, see Een Europese strafrechtelijke ruimte van 9 mei 2003 van de Staatssecretaris voor Europese Zaken, kenmerk DIE-258/03.

leading principle. This leads to a completely different rule: jurisdiction inside the European Union is only to be established on a state's own territory. In this view Germany can no longer prosecute (soft) drug abuse in the Netherlands by a German citizen. But it also means that if the Greeks deem it necessary to make the “spotting” of registration numbers of airplanes criminally liable, the Netherlands will assist them with investigation and prosecution. This requires a considerable degree of trust (or mutual recognition), but it also offers tremendous advantages for the enforcement of law as well as for the protection of the rights of individuals. It is always clear which state can be called upon to enforce. After all, the present situation of overlapping jurisdiction leads to a continuous discussion between Member States as to whether an offence should be criminalized and what criminal policy should be followed. Moreover, abolishing the double criminality requirement and restricting jurisdiction to the territory of the state where the crime was committed builds upon on the existing network of international co-operation in criminal matters. After all, the network of co-operation of the Council of Europe has never been able to incorporate one important theme: an arrangement for jurisdiction conflicts.⁸ The expansion of jurisdiction over national borders once originated from the concern that a suspect might get off scot-free and that it therefore should be possible to call him to account in his own country, but not to correct the criminal policy of another country. In the end, there are differing opinions about just a few crimes. Most of the criminal offences have been made liable to punishment in some sort of form in the entire Union. The differences that remain are probably too important to neglect. The demarcation just presented deals with the relation between different Member States. It gives no solution for difficult cases in which the *locus delicti* can not be easily placed in one state. These cases ought to be arranged on a Union level. We therefore need to set criteria for the cases that should be dealt with on a European level.

⁷ Memorandum on the requirement of double criminality (Notitie Het vereiste van dubbele strafbaarheid in het Nederlandse strafrecht), Parliamentary Documents Second Chamber, 2003-2004, 29451, nr.1.

⁸ Various attempts to solve the problem by means of priority rules with regard to jurisdictional principles failed. However, it did lead to an interesting study: European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg 1990. If the European Union were to prevent jurisdictional conflicts, it would finally respond to its obligations under Article 31(c) Treaty on European Union and Article III-270 Constitution for Europe.

What could these criteria for a distinction between a European and the nationals' criminal justice systems be? In the memorandum 'European criminal law' presented by the Dutch government in 2003, the following was stated: 'An effective war on crime against the interests of the Union (forgery of the Euro and fraud against the financial interests of the Community) and of severe cross border crime, that has to be defined but which can vary from smuggling of illegal goods or persons to the harming of the environment, will in the end demand its own homogeneous jurisdiction that is not cut through by national borders.'⁹

In fact, the Minister appeals to criminological insights with regard to the manifestations of crime and, in particular, with regard to the question as to whether the offences concerned are border cross-border ones. In my opinion, this is the correct road. I consider the current methodology not very well thought-through: establishing an organisation first, such as, Europol, the European Public Prosecutor, or introducing new criminal offences about topics in the news right before a European summit. After all, this only concerns image building, not the real law.

The demarcation ought to be found in the rules on jurisdiction and on substantive criminal law, not in conditions for co-operation. For this reason, criminal offences that are to be part of the European criminal law should meet certain conditions. What are these conditions? In my opinion there are three cumulative conditions:

1. the criminal offence manifests a cross-border character.
2. the prevention, tracing and trying of such an offence experiences more difficulties on national level than on a European level.
3. the criminal offence is related to a European field of policy.¹⁰

The first condition requires that qualifying criminal offences have a *locus delicti* in several countries, which makes it difficult to designate one particular state as the most appropriate one. Examples of such offences are to be found in customs and excise law, subsidy fraud, money laundering, trafficking in human beings and drugs and

⁹ Memorandum of 9 May 2003.

¹⁰ See André Klip, *Uniestrafrecht/ Criminal Law in the European Union*, Inaugural Lecture Maastricht, Kluwer Deventer 2004.

arms trade. The second condition deals with efficiency. If the case involves border crossing aspects but national law enforcement agencies can handle them without problems, there is no need for European involvement. The third element ensures that various enforcement modalities are seen in coherence, but it also emphasizes the need for subsidiarity.

Naturally, there will be suspects that will not follow such a division of jurisdiction when they plan to commit a crime. Factual complications will occur in which suspects commit European and national criminal offences. The principle of a fair administration of justice, derived from the transfer of proceedings, can play a decisive role in the search for the most appropriate forum here.

Thus, the European legal area leads to three rather well-defined jurisdictions: national, European and outside the European Union. I feel less enthusiastic about the mandate given in the establishment of a European Public Prosecutor as expressed in Article III-274 that creates a hybrid system, that keeps to the middle road between national and European enforcement. Similar objections exist against the American solution in which the definition between federal and state criminal law is not very clear and leads to several jurisdictional conflicts. If we decide to introduce a new European criminal justice system, the European influence on the national criminal justice system will be much less. Furthermore, it dissolves the objection that national priorities would be suppressed when further hierarchal competences are given to Europol or Eurojust.

§6. Realism instead of Utopianism

It is not all roses in such a perspective. A European system inevitably also has negatives attached to it. New organs are created, which leads to a increase of data flow. A system like this also needs to be psychologically accepted by national law enforcement agencies. A new institute should not be seen as a threat or as a competitor and in this way be deprived of information. The not particularly prosperous position of Europol makes one pessimistic.

Harmonisation of national criminal law is not necessary for a system chosen above in which there is a European criminal justice system for certain offences and a national

criminal justice system for the other offences. The present harmonisation of criminal law has been criticized many times and for good reasons as it starts from the impure premise that double criminality stands in the way of cooperation in criminal matters.

Starting from separate jurisdictions – a European one with regard to specific European offences and several national jurisdictions on behalf of national offences – there is then no need for the condition of double criminality. Accordingly, one reason for harmonisation of substantive criminal law is lost. Although harmonisation may fulfil a function with regard to procedural aspects of law. This requires an explanation.

If the Member States accept from each other that the execution of jurisdiction is exclusive, this will lead to an important contribution to an unconditional mutual recognition of hand-over warrants of persons and exhibits and other decisions. In a system of unconditional recognition, the barriers between criminal justice systems disappear. In order to achieve complete freedom of movement, several obstacles have to be removed. For example, the conditions to proceed with the apprehension of suspects differ from one member state to another. This puts a member state under pressure that sets higher conditions. Similar problems can occur by other means of coercion and the collection of evidence. The convergence towards one another of the conditions that are to be fulfilled before search and seizure is allowed will take away the objections against the recognition of a foreign order.

Such findings show the need for a conceptualization of the principle of mutual recognition. It is here that the Constitution suffers from its greatest lacuna. Mutual recognition is regarded as a corner stone of its policy in criminal law, but it has not been defined. What is it exactly that needs to be recognized and by whom (first)? That some material conditions need to be met before applying any methods of coercion? That a certain authority has determined this? That the requested country applies the procedural rules for collecting evidence as applied by the requesting state? And why should the obligatory execution of a foreign request interfere with the state's own administration of justice? In short, the notion needs to be provided with a concept.

In the present situation, the state that makes the first move determines that another state ought to acknowledge something. Why in a system of mutual recognition should

a state that prosecutes be given priority over a state that has decided to attach no consequences to a certain act? With the limitation of jurisdiction, such a question is no longer under discussion.

The already vague concept of mutual recognition is made even more unclear through the existence of now 20 official languages. When enforcement becomes a common European task, there is no place for the differences resulting from the use of different languages. In striving for integration and harmonization, the Union creates a huge barrier by holding on to the fact that all European languages are considered as authentic languages.

By choosing one language, room is given for one European legal language to grow. It speaks for itself that the choice is likely to be English. This might lead to a problem because it may be assumed that the more common part of the criminal justice systems of the member states lies in a civil law structure. Experiences in the various international criminal courts show that a complete new system originates, finding its own balance in spite of the fact that specific regulations come from different systems. Therefore, it should be possible that a European legal language, English, extricates itself from the specific national context. We will be much better able to understand each other if we can base our discussion on the same binding legal text, instead of different languages versions.

§7. Concluding remarks

The first impression of the Constitution as a stimulant to further European integration is false. It does not formulate its goals well and fails to specify why a role in the field of criminal law should be given to the European Union. The new Constitution offers more freedom to the executive on the national level. Comprise legislation that requires national implementation paves the way for that, even though now provided with more democratic legitimation by the European parliament. Despite this missed opportunity, academics should continue to reflect on what a European criminal justice system could and should look like in the long run. This also means that it is not a disaster if not all Member States were to ratify the Constitution. New negotiations can only lead to a better result. Although it might not be a political reality of today, no one

knows when it will become an urgent matter. As the drastic legal measures taken after 9/11 in the European Union and elsewhere have taught us, unexpected events can serve as a trigger mechanism for decisions that would never be taken in a quiet political setting. In such a context, one does well to be prepared.

André Klip